Filed 3/25/19 P. v. Perez CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. AUGUSTIN PEREZ, Defendant and Appellant.	B289956 (Los Angeles County Super. Ct. No. KA104290) **ORDER MODIFYING OPINION AND DENYING PETITION FOR REHEARING** **[NO CHANGE IN JUDGMENT]**

THE COURT*:

It is ordered that the opinion filed herein on February 28, 2019, be modified as follows:

1. At the bottom of page 11, after the language, "The trial court did not abuse its discretion in crediting reality over defendant's proffered alternative and speculative fantasy of "what might have been." (*People v. Morris* (1988) 46 Cal.3d 1, 38 [trial court does not abuse its discretion in rejecting evidence that is "speculative at best"], overruled on other grounds in *In re*

Sassounian (1995) 9 Cal.4th 535, 543, fn. 5" - add the following new paragraph:

* * *

In light of our conclusion that the trial court did not abuse its discretion in declining to strike these three allegations, we necessarily reject defendant's related argument that the court's denials also violated due process.

There is no change in the judgment.

Appellant's petition for rehearing is denied.

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[*] ASHMANN-GERST, Acting P.J., CHAVEZ, J., HOFFSTADT, J.

Filed 2/28/19 P. v. Perez CA2/2 (unmodified opinion)

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. AUGUSTIN PEREZ, Defendant and Appellant.	B289956 (Los Angeles County Super. Ct. No. KA104290)

APPEAL from a judgment of the Superior Court of Los Angeles County. Juan Carlos Dominguez, Judge. Affirmed in part, remanded in part.

Maureen L. Fox, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Shawn McGahey Webb, Supervising Deputy

Attorney General, and Nima Razfar, Deputy Attorney General, for Plaintiff and Respondent.

* * * * * *

Augustin Perez (defendant) stands convicted of several crimes for pistol whipping a woman in the head when she refused to disclose the location of her friend, for vandalizing the friend's car with gang-related graffiti, and for urging fellow gang members and others to dissuade his victim and her friend from testifying against him. In this third appeal of his sentence, he argues that the trial court erred in not dismissing the allegations regarding his personal use of a gun, his gang affiliation, and his prior "strike" offense under our Three Strikes Law (Pen. Code, §§ 667, subds. (b)-(j), 1170.12, subds. (a)-(d)).[1] He also argues that he is entitled to a third remand to give the trial court the opportunity to exercise its discretion to strike the allegation that his prior attempted murder conviction constitutes a prior "serious" felony under the newly enacted Senate Bill 1393. We conclude that the trial court did not err in denying his motions to dismiss the gun, gang, and strike allegations, but that he is entitled to have the trial court consider whether to strike his prior "serious" felony allegation. Accordingly, we remand for the trial court to consider whether to exercise its discretion under Senate Bill 1393.

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1 All further statutory references are to the Penal Code unless otherwise indicated.

FACTS AND PROCEDURAL BACKGROUND

I. Facts[2]

In December 2013, defendant and a masked man approached Angela Rodriguez (Rodriguez) as she stood in a friend's backyard, and demanded to know where Santiago Grajeda (Grajeda) had gone. Defendant had a semi-automatic pistol in his hand. When Rodriguez said she did not know and refused defendant's demand to hand over her cell phone, the masked man kicked Rodriguez until she fell to the ground and defendant, after grabbing her cell phone, proceeded to pistol whip Rodriguez in the head with the gun until she lost consciousness. As a result of these beatings, Rodriguez had a broken ankle, lacerations to her ear and cheek, and swelling in her head; she suffered temporary hearing loss and permanent damage to her long-term memory. (*Perez I*., at pp. 2-3.) Defendant and the masked man left.

A few hours later, defendant returned to vandalize Grajeda's car, which was out in front of the friend's house.

By January 2014, defendant was in custody for these crimes. In that month and the next, defendant made 136 calls to various people directing them to track down Rodriguez's and Grajeda's whereabouts, to "get ahold of" and "talk to" Rodriguez, and to give the police reports documenting Grajeda's cooperation to Grajeda's fellow gang members (which would prompt those members to retaliate against Grajeda.) (*Id.* at p. 3.)

II. Procedural History

The People charged defendant with six crimes. For the assault on Rodriguez, the People charged defendant with (1)

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2 The facts are drawn primarily from our prior decision in *People v. Perez*, No. B263400 (nonpub. opn.) (*Perez I*).

robbery (§ 211), (2) assault with a semi-automatic firearm (§ 245, subd. (b)), and (3) assault by means of force likely to cause great bodily injury (§ 245, subd. (a)(4)). As to these crimes, the People alleged that defendant personally used a semiautomatic firearm (§ 12022.53, subd. (b)) and that he personally inflicted great bodily injury (§ 12022.7, subd. (a)). For damaging Grajeda's car, the People charged defendant with felony vandalism (§ 594, subd. (a)(4)). And for the jailhouse calls, the People charged defendant with (1) conspiring to attempt to dissuade a witness (§ 182, subd. (a)(1)), and (2) attempting to dissuade a witness with malice and in furtherance of a conspiracy (§ 136.1, subd. (c)(2)). As to all of the crimes, the People alleged that they were committed for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (b)). The People further alleged that defendant's 1993 conviction for attempted murder constituted a "strike" as well a prior "serious felony" (§ 667, subd. (a)(1)), and that defendant had served three prior prison terms for his 1993 conviction, his 2008 conviction for possessing a firearm (former § 12021, subd. (a)(1)) and his 2008 conviction for possessing methamphetamine (Health & Safety Code, § 11377, subd. (a)). (*Id*. at pp. 3-4.)

A jury convicted defendant of all six crimes, and found all offense-related allegations true. In a bifurcated proceeding, the trial court found true the allegations regarding defendant's prior convictions. (*Id*. at 4.)

At defendant's third sentencing hearing in February 2018,[3] the trial court sentenced defendant to prison for 42 years and

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3 We reversed the first sentence imposed by the trial court (see *Perez I*) as well as the second sentence imposed by the trial

four months. The court imposed a 38-year sentence for the robbery, calculated as a base sentence of 10 years (an upper-term sentence of five years, doubled due to the prior strike), plus 10 years for personal use of a firearm plus 10 years for the gang enhancement plus three years for inflicting great bodily injury, plus five years for the prior "serious" felony. The court then imposed a consecutive two year and four month sentence for vandalizing Grajeda's car, calculated as a base sentence of 16 months (one-third of the mid-term sentence of two years, doubled due to the prior strike) plus one year for the gang enhancement (one-third of the mid-term enhancement of three years). The court finally imposed a consecutive two year sentence for conspiring to dissuade a witness. Invoking section 654, the court stayed the sentences on the remaining counts. Before imposing this sentence, the court denied defendant's oral motions to dismiss the personal use of a firearm enhancement, the gang enhancement, and his prior "strike" conviction. Defendant filed a timely notice of appeal.

DISCUSSION

I. Denial of Motions to Dismiss Allegations

Defendant argues that the trial court abused its discretion in denying his motions to dismiss the gun, gang and strike allegations. (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 505-506.) A trial court abuses its discretion if it applies the wrong legal standard, if it relies on facts not supported by substantial evidence, or if its exercise of discretion is arbitrary and capricious. (*People v. Knoller* (2007) 41 Cal.4th 139, 156; *People v. Cluff* (2001) 87 Cal.App.4th 991, 998, 1002; *People v.*

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court on remand from *Perez I* (see *People v. Perez*, No. B281529 consolidated with B281981 (nonpub. opn.) (*Perez II*).

Thimms (2006) 138 Cal.App.4th 1207, 1213; *People v. Sandoval* (2007) 41 Cal.4th 825, 847.)

A. *Firearm enhancement*

Section 12022.53, subdivision (b) requires a trial court to impose a consecutive, 10-year prison term when a defendant "personally uses a firearm" "in the commission" of certain enumerated felonies. (§ 12022.53, subd. (b).) Since January 1, 2018, trial courts have had the discretion to dismiss this allegation "in the furtherance of justice. (*Id.*, subd. (h); § 1385, subd. (a).)

The trial court denied defendant's motion to dismiss the "personal use of a firearm" enhancement in light of the "clear" "circumstantial evidence" "that the gun was used as a blunt instrument to inflict [injury]" on Rodriguez. This enhancement applies when a defendant "display[s]" a firearm "in a menacing or threatening way," uses the firearm to "hit or strike the victim," or discharges the firearm. (*People v. Brookins* (1989) 215 Cal.App.3d 1297, 1304.) Because defendant's conduct falls squarely within the ambit of the enhancement's reach, the trial court did not abuse its discretion in declining to dismiss it.

Defendant raises two categories of challenges to this conclusion.

First, he argues that the trial court's stated reason for denying his motion—namely, that "[t]he gun was used as a blunt instrument to inflict injury"—is not supported by substantial evidence because Rodriguez was *also* injured by the masked man's kicks. This argument is specious because it misreads the trial court's words to say that defendant's pistol whipping was the *sole* cause of Rodriguez's injuries, but the court says no such thing. What is more, the record amply supports the jury's finding

that defendant used his gun to bludgeon Rodriguez's head and that she suffered severe and permanent injuries due to those blows because Rodriguez testified she did not feel any blows to the head until defendant's masked cohort left, leaving her alone with defendant. Defendant's suggestion to the contrary is baseless.

Second, defendant contends that the trial court "overlook[ed] pertinent mitigating factors." He points out that he only used the gun as a bludgeon and did not *also* threaten Rodriguez with it or discharge it. Defendant's failure to violate the personal use enhancement in all three ways articulated by the statute is not a mitigating factor, particularly when his use of the weapon as a bludgeon was far worse than merely displaying it in a menacing manner. Defendant asserts that imposing an additional 10-year sentence because he chose to bludgeon Rodriguez with a gun rather than another object is unfair and is duplicative of the enhancement for inflicting great bodily injury. As courts have noted time and again, our Legislature punishes crimes involving firearms more severely for good reason: Firearms are "particularly lethal to the victim . . . [and] others in the vicinity" because they "allow[] the perpetrator to effortlessly and instantaneously execute an intent to kill once it is formed" (*People v. Zepeda* (2001) 87 Cal.App.4th 1183, 1215), and attaching greater penalties "deter[s] the use of firearms and save[s] lives" (*People v. Martinez* (1999) 76 Cal.App.4th 489, 497-498). These rationales apply whenever a defendant brings a gun along to commit a crime, even if he ultimately decides only to brandish it or use it as a bludgeon. The fact that a defendant can use a firearm to inflict great bodily injury does not render the enhancements for personal use of that firearm and inflicting

great bodily injury duplicative; they punish different conduct that inflicts different harms (use of a dangerous instrumentality versus inflicting of an especially egregious injury). (Accord, *People v. Davis* (1995) 41 Cal.App.4th 367, 372-375.) Defendant finally posits that his use of the gun was less blameworthy because he pistol whipped someone other than the person he was looking for (Grajeda). Defendant's decision to pistol whip anyone who happened to stand in his way of finding Grajeda evinces a willingness to use violence indiscriminately, which tends to aggravate rather than mitigate his crimes.

B. *Gang enhancement*

Section 186.22 requires a trial court to impose a consecutive, 10-year prison term if he commits a violent felony "for the benefit of, at the direction of, or in association with a[] criminal street gang." (§ 186.22, subd. (b)(1)(C).) A court nevertheless has the discretion to strike this enhancement "where the interests of justice would best be served." (*Id.*, subd. (g).)

The trial court denied defendant's motion to strike the gang enhancement in light of the jury's rejection of defendant's argument at trial that defendant's acts were solely personal rather than gang-related. The trial court did not abuse its discretion in deferring to the jury's findings.

Defendant argues that trial court should have dismissed the gang enhancement because defendant did not personally make any gang-related statements directly to Rodriguez before beating her with the gun. This argument ignores the broader context in which defendant's actions took place. Just minutes before defendant showed up with the masked man, the masked man and another woman had approached Rodriguez and Grajeda,

announced that he was with "Bassett Grande" (a local gang), and demanded to know *their* gang affiliation. (B263400, at p. 2.) A few minutes later (but before defendant arrived), the woman returned to proclaim that "Pelon"—the moniker defendant adopted as a member of the Bassett Grade gang—was on his way. (*Ibid.*) Defendant then appeared. Hours after defendant beat Rodriguez, he vandalized Grajeda's car by etching "B" and "G" (the initials for Bassett Grande) on the car's exterior as well as the misspelled name "Belon." (*Id.* at p. 3.) In short, and as we noted in *Perez I*, the evidence that Rodriguez's assault was gang-related was "overwhelming." (*Id.* at p. 18.)

Defendant's failure to make gang-related statements to Rodriguez after his underlings had all but formally heralded his gang affiliation in advance does not compel dismissal of the gang allegation. Defendant urges us to ignore what happened before and after the assault, but cites no authority for the proposition that the trial court was required to view the evidence in such a compartmentalized and myopic manner. Defendant further suggests that his motive for beating Rodriguez was personal (and not gang-related) because his reason for seeking out Grajeda (and beating Rodriguez for not helping him in his quest) was personal—namely, because Grajeda was romantically involved with a woman defendant also liked. But the jury rejected this suggestion. More to the point, the existence of a second, underlying personal motive for defendant's acts does not somehow negate his resort to gang-related tactics to commit those acts or the benefit accruing to his gang through his use of those tactics; in short, it does not compel dismissal of the gang enhancement.

C. *The "strike" allegation*

A trial court has the discretion to dismiss a "strike" allegation under our Three Strikes Law. (§ 1385, subd. (a); *People v. Williams* (1998) 17 Cal.4th 148, 162.) In deciding whether to exercise that discretion, the court is to "'consider whether, in light of the nature and circumstances of [the defendant's] present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the [Three Strikes] scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.' [Citation.]" (*People v. Carmony* (2004) 33 Cal.4th 367, 377.)

The trial court denied defendant's motion to dismiss the prior "strike" offense, finding that defendant "f[e]ll within the spirit of the Three Strikes legislation." The court explained that his 1993 attempted murder conviction was not too old to be considered as a strike because defendant had, in the intervening decades, "chose[n] [a] trajectory" that involved the commission of felonies. The court also noted the "egregious" physical and psychological injuries inflicted upon Rodriguez. These reasons do not indicate that the trial court acted arbitrarily or capriciously in declining to dismiss the "strike" allegation.

Defendant argues that the trial court abused its discretion because, if the recent decisions redefining what constitutes cruel and unusual punishment for juveniles (because juveniles lack maturity, are more vulnerable to negative influences and have less "well formed" character) had been the law in 1992, he might have received a shorter sentence for attempted murder and, as a result, might have led a different and law-abiding life that would

render his 1993 conviction an ancient anomaly that should not be considered a "strike." We reject this argument. Although more recent cases such as *Miller v. Alabama* (2012) 567 U.S. 460, 471 have taken a different approach to juvenile sentencing than earlier precedent, there is nothing to indicate that defendant's 10-year prison sentence for striking the umpire who ejected him from a baseball game in the head with a bat would have been any shorter under *Miller* and its progeny. More to the point, defendant's assertion that a shorter sentence in 1993 would have resulted in an alternative timeline where he was a law-abiding citizen is pure speculation. What is *not* speculative is what defendant actually chose to do with his life, which was—with the exception of a five-year hiatus between 2001 and 2006—to live a life of crime. (*Rummel v. Estelle* (1980) 445 U.S. 263, 284 [recidivist statutes are aimed at chronic offenders].) The trial court did not abuse its discretion in crediting reality over defendant's proffered alternative and speculative fantasy of "what might have been." (*People v. Morris* (1988) 46 Cal.3d 1, 38 [trial court does not abuse its discretion in rejecting evidence that is "speculative at best"], overruled on other grounds in *In re Sassounian* (1995) 9 Cal.4th 535, 543, fn. 5.)

II. Senate Bill 1393

On September 30, 2018, the Governor signed Senate Bill 1393, which amends section 1385 to eliminate the prohibition on dismissing prior "serious" felony conviction allegations under section 667, subd. (a). (§ 1385, subd. (b) (2018 ed.); Sen. Bill No. 1393 (2017-2018 Reg. Sess.) § 2.) Because this new law grants a trial court the discretion to mitigate or reduce a criminal sentence, it applies retroactively to all nonfinal convictions unless the Legislature has expressed a contrary intent. (*People v.*

Francis (1969) 71 Cal.2d 66, 75-78; *In re Estrada* (1965) 63 Cal.2d 740, 744-745.) Our Legislature has expressed no such intent in Senate Bill 1393. Because defendant's convictions are not yet final, he is entitled to have the trial court exercise its newfound discretion whether to strike the two prior "serious" felony allegations unless the court, during the original sentencing, "clearly indicated . . . that it would not . . . have stricken" those allegations if it had been aware of having the discretion to do so. (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 425.) Although the trial court's decisions to impose the high-end base term for the robbery count, to run each of the non-stayed offenses consecutively, and to deny all three of defendant's motions to strike enhancements strongly suggests that the trial court is unlikely to strike the prior "serious" felony enhancement, that enhancement is shorter in duration than the enhancements the trial court refused to dismiss and the court did not explicitly state it would never impose anything less than the maximum sentence. Accordingly, the court should be given the opportunity to decide whether to exercise its newfound discretion.

DISPOSITION

The case is remanded to allow the trial court to consider whether the sentence enhancement under section 667, subdivision (a)(1) should be stricken pursuant to Senate Bill 1393. If the court elects to exercise its discretion and to resentence defendant, the trial court is directed to prepare an amended abstract of judgment and forward a certified copy of it to the Department of Corrections and Rehabilitation. The judgment is otherwise affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.

HOFFSTADT

We concur:

_____, Acting P. J.

ASHMANN-GERST

_____, J.

CHAVEZ